In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 917

JOSEPH ELKANICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 327 F. 2d 417.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on January 13, 1964. A petition for rehearing was denied February 18, 1964. The petition for a writ of certiorari was filed on March 14, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's arrest and the subsequent search were supported by probable cause.

STATEMENT

Petitioner was convicted on three counts charging him with unlawfully selling, concealing and facilitating the sale, concealment and transportation of heroin, in violation of 21 U.S.C. 174, and concurrent fifteen year sentences were imposed on each count. The only issue raised by this petition is the denial of his pretrial motion to suppress certain items ($1550 in marked currency, a plastic envelope and a manila envelope) seized incident to his arrest, and denial of his motion during trial to exclude those items as evidence.

Petitioner was arrested in his apartment at approximately 6 p.m. on July 20, 1962 (II, 3),[1] as the culmination of an investigation into the unlawful sale of narcotics by one Albert Rios. The investigation commenced when Federal Narcotics Agent Leonard S. Lang was introduced to Rios by an informer as a potential purchaser of heroin, and started buying

[1] The record is in six volumes; the roman numeral indicates the volume cited. Volume II is the transcript of the hearing on the motion to suppress, which is independently numbered. Volumes III through VI are the trial transcript, which are consecutively numbered.

heroin directly from him (II, 5). Lang made three purchases from Rios, on July 13, July 18 and July 19, paying him in each instance with marked "government advanced funds" (II, 4). On all three occasions, Rios had taken the money, left Lang for a length of time, and then returned with the heroin. On the first occasion, Lang had accompanied Rios to the vicinity of a hotel called Marlow Apartments; Rios had entered the hotel, saying that he was going to meet a man, and had returned with the narcotics (II, 9).

On July 19, after the third sale was consummated, Rios was arrested by other agents. Although Lang had paid him $1200 in connection with the sale, only $200 was found in his possession (III, 71; IV, 177, 190-191). Also found in his possession and taken from him were two keys and an address book. He then claimed that he wished to cooperate with the agents, and stated that the source of his supply was a Chinese seaman named "Charlie" (II, 8). Lang spent most of the night of July 19 unsuccessfully checking an apartment building to ascertain if the keys taken from Rios would fit any apartment. He interviewed Rios again on July 20, and Rios, still claiming that he wished to assist, again stated that "Charlie" was his source in each of the three sales. He also said that the keys were to Room 30 in the Marlow Apartments, where he had made the July 13 purchase from "Charlie" (II, 9).

Lang then interviewed the landlady, who stated that in the three months that she had the apart-

ments, no Chinese had ever been there (II, 10; III, 56). Her records did indicate, however, that on July 13 Room 30 was rented by petitioner, and she gave a description of petitioner which matched the description of him contained in the Narcotics Bureau files (II, 10). Later, when shown a photograph of him obtained from the local police, she positively identified him as the person who had rented the room (II, 11).

The files contained information from two separate sources, both of which were deemed reliable, linking petitioner to the heroin traffic as far back as 1951. They also contained two memoranda from an agent who had approached petitioner in an undercover capacity in 1953 or 1954 and had been informed by him that he was not then in the business, but that if he returned to the business he could supply the agent with large quantities of heroin (II, 10-11, 14-15).

No telephone was found listed to petitioner in the telephone book. The telephone company, however, supplied his unlisted number and his address, and the number was the same as that contained, under the name of "Joe", in the address book taken from Rios (II, 12).

By the time all of this information was collected, it was after 6 p.m. on July 20, and the commissioner was not available (*ibid.*). Lang, taking note of the fact that Rios had attempted to shield the true identity of his supplier and the additional fact that he had access to a telephone in the local jail in which he was lodged, determined that there was a possibility that Rios would attempt to warn petitioner, and therefore

decided that it would be best to effectuate the arrest immediately without waiting to obtain a warrant (II, 12-13). He and another agent therefore went to petitioner's apartment, tapped on the window (because a note displayed for the telephone repairman indicated that the buzzer was not working, II, 7), and when the door was opened by petitioner's common law wife announced to her that they were agents (Lang also displayed his badge in his hand) and walked in and arrested petitioner (II, 6, 16). Thereafter, they searched the premises and seized the marked currency and the two envelopes.

Petitioner's motion to suppress was denied without opinion (II, 22), and his motion to exclude the evidence, made at his first trial, was also denied (III, 42).[2] The court at his second trial made an independent finding that "the totality of the chain of circumstances in the instant case are clearly such in and of themselves as to constitute probable cause to believe that [petitioner] had committed a felony, and that he was the source of supply to Rios . . . [and] would be sufficient upon which to base a request for [an arrest] warrant . . . [which] would or should issue" (IV, 99). The court listed in detail the basis for this determination and commented that "any other conclusion would be unreal" (IV, 99-100).[3] The court

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[2] The record does not indicate the reason why a second trial was necessary.

[3] The court ruled that the facts "within the knowledge of Agent Lang" were sufficient to constitute probable cause "regardless of the reliability of Rios as an informant" and noted

of appeals, after reviewing the facts upon which Lang acted, held that "[a]ll of these circumstances furnished Agent Lang abundant probable cause and reasonable ground for believing that narcotics offenses had been committed by someone in addition to Rios" (Pet. App. A, viii) and that "the officer had probable cause and reasonable grounds for believing appellant was the one involved with Rios in the narcotic transactions under investigation" (*id.*, ix).

ARGUMENT

Express statutory authority is conferred upon narcotics agents by 26 U.S.C. 7607 to make arrests without warrant upon probable cause. For the reasons carefully enumerated by the district court (see IV, 99-100) and reiterated by the court of appeals (see Pet. App. A, vii-ix), it is clear that Agent Lang had sufficient cause here to sustain the arrest. The right of officers to search incident to a lawful arrest is, of course, well settled and was recently reaffirmed by this Court in *Preston* v. *United States*, No. 163, this Term, decided March 23, 1964.

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that there did not appear to be any reliance by Lang upon any statement made by Rios (IV, 101). The government had specifically disclaimed any reliance upon Rios as an informer of known reliability, and suggested instead that it was his unreliability which gave rise to the suspicious circumstances (III, 52).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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